ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[OH70–1–6780b; AD–FRL–5302–7]

Approval and Promulgation of Implementation Plans; Ohio

AGENCY: Environmental Protection Agency (SEPA).
ACTION: Proposed rule.

SUMMARY: The USEPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Ohio for lead. USEPA further proposes to conclude that this revision resolves the prior inadequacy in limiting lead concentrations in central Cleveland. In the Final Rules section of this Federal Register, USEPA is fully approving the State's SIP revision as a direct final rule without prior proposal, because the USEPA views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to these actions, no further activity is contemplated in relation to this proposed rule. If USEPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received on or before November 27, 1995.

ADDRESSES: Written comments should be mailed to: J. Elmer Bortzer, Chief, Regulation Development Section, Regulation Development Branch (AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the State submittal and USEPA's analysis of it are available for inspection at: Regulation Development Section, Regulation Development Branch (AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: John Summerhays, Regulation Development Section, Regulation Development Branch (AR–18J), United States Environmental Protection Agency, Region 5, Chicago, Illinois 60604, (312) 886–6067.

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule published in the rules section of this Federal Register.

Authority: 42 U.S.C. 7401–7671q.

Dated: September 13, 1995.

David A. Ullrich,

Acting Regional Administrator.

[FR Doc. 95–26655 Filed 10–26–95; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 70

[AD-FRL–5319–9]

Clean Air Act Proposed Disapproval or in the Alternative, Proposed Interim Approval Operating Permits Program; State of Idaho

AGENCY: Environmental Protection Agency (EPA).
ACTION: Proposed disapproval or in the alternative, proposed interim approval

SUMMARY: EPA proposes alternative actions on the operating permits program submitted by the Idaho Department of Health and Welfare, Division of Environmental Quality, for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources. EPA proposes disapproval of the Idaho program based on existing deficiencies in Idaho's excess emissions and administrative amendments regulations. The State has advised EPA, however, that it intends to adopt and submit to EPA revised regulations that address these deficiencies before EPA takes final action on this proposal. Therefore, EPA proposes in the alternative that, if these deficiencies are addressed to EPA's satisfaction before EPA takes final action on this proposal, the Idaho program be granted interim approval.

DATES: Comments on this proposed action must be received in writing by November 27, 1995.

ADDRESSES: Comments must be submitted to Elizabeth Waddell at the address indicated. Copies of the State's submittal and other supporting information used in developing this action are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Elizabeth Waddell, 1200 Sixth Avenue, AT–082, Seattle, WA 98101, (206) 553–4303.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Background

As required under title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (''the Act'')), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of State operating permits programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 Code of Federal Regulations (CFR) part 70. Title V requires States to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The Act requires that States develop and submit these programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

B. Federal Oversight and Sanctions

EPA must apply sanctions to a State for which 18 months have passed since EPA disapproved the program. In addition, discretionary sanctions may be applied any time during the 18 month period following the date required for program submittal or program revision. If the State has no approved program 2 years after the date required for submission of the program, EPA will impose additional sanctions, where applicable, and EPA must promulgate, administer, and enforce a Federal permits program for the State. EPA has the authority to collect reasonable fees from the permittees to cover the costs of administering the program.

II. Proposed Action and Implications

A. Analysis of State Submission

1. Support Materials

On November 15, 1993, the Idaho Department of Health and Welfare, Division of Environmental Quality (referred to herein as ''IDEQ,'' ''the Department,'' ''Idaho'' or ''the State''), submitted a title V program for EPA review. EPA notified the State in writing on January 13, 1994, that the submittal was incomplete and advised the State of the changes needed for EPA to find the submittal complete. On January 20, 1995, Idaho resubmitted the State's title V program and requested approval of

the program. EPA notified Idaho by letter dated March 14, 1995, that this submittal was complete. The State submitted additional information to EPA to supplement its January 1995 submittal on July 14, 1995, and September 15, 1995. Although EPA considers these supplemental submittals to be material changes to Idaho's January 1995 program submittal, EPA has chosen not to extend its review period beyond the initial 1 year.

Section 2 of the Idaho submittal addresses the requirement of 40 CFR 70.4(b)(1) by describing how the State intends to carry out its responsibilities under the part 70 regulations. An implementation agreement is currently being developed between Idaho and EPA. EPA has deemed the program description to be sufficient for meeting the requirement of 40 CFR 70.4(b)(1).

Section 3 of the Idaho submittal includes a legal opinion from the Attorney General of Idaho addressing the thirteen program elements set forth in 40 CFR part 70 that are specifically required by title V and 40 CFR part 70, as well as several additional program elements. Together with a supplemental opinion submitted on July 20, 1995, these opinion letters demonstrate adequate legal authority to implement all aspects of the title V operating permit program in Idaho.

Appendix V of the Idaho submittal contains the relevant permitting program documentation which is not contained in regulations, such as permit application forms, permit forms and relevant guidance to assist in the State's implementation of its permit program, as required by § 70.4(b)(4). EPA has determined that the forms meet the requirements of 40 CFR 70.5(c) for standard permit application forms.

In summary, EPA believes that Idaho's title V operating permits program substantially meets the requirements of 40 CFR part 70, §§ 70.2 and 70.3 for applicability; §§ 70.4, 70.5, and 70.6 for permit content, including operational flexibility; § 70.7 for public participation and minor permit modifications; § 70.8 for permit review by EPA and affected States; § 70.5 for criteria which define insignificant activities; § 70.11 for requirements for enforcement authority; and § 70.5 for complete application forms. The issues that EPA proposes the State must address in order to obtain interim approval and full approval are discussed below under ''Options for Program Approval and Implications.''

The full program submittal and the Technical Support Document (TSD) are contained in the docket at the address noted above and provide more detailed information on the State's program.

2. Regulations and Program Implementation

a. Regulations

The Idaho title V operating permit program, known as the Tier I operating permit program, is authorized by the Environmental Protection and Health Act (EPHA), Idaho Code 39–101, *et seq.*. The State of Idaho revised its *Rules for the Control of Air Pollution in Idaho*, Volume 16, Title 1, Chapter 1 of the Idaho Administrative Code (IDAPA) to implement the requirements of 40 CFR part 70. These revisions were adopted on April 8, 1994, and became effective May 1, 1994. Additional revisions to IDAPA 16.01.01 and to 39 of the Idaho Code were made by the legislature in March of 1995 and by the Department in June of 1995 and are currently in effect. These rules and statute, as well as other rules and statutes governing State permitting and administrative actions, were submitted by Idaho with evidence of procedurally correct adoption as required by 40 CFR 70.4(b)(2).

IDAPA 16.01.01 contains regulations pertaining to both title V and non-title V sources. Therefore, this notice proposes to approve certain regulations within IDAPA 16.01.01 as part of Idaho's title V program. The Technical Support Document identifies the regulations approved in this rulemaking. The remainder of IDAPA 16.01.01 has been submitted by the State as a revision to the Idaho State Implementation Plan (SIP) and will be approved or disapproved as part of the Idaho SIP.

b. Scope of Proposed Action

The Governor's January 20, 1995, letter to EPA contains the statement that IDEQ is ''the sole implementing agency in the State of Idaho and will provide coverage to all geographic regions statewide.'' The State also submitted a list of title V sources in Idaho which included sources within the exterior boundaries of several Indian reservations in Idaho. The Shoshone-Bannock Tribes and the Kootenai Tribe of Idaho interpreted the State's submittal as an assertion by Idaho of permitting authority over sources on Tribal lands and have requested EPA to deny Idaho authority to implement Idaho's operating permits program within the exterior boundaries of Indian reservations in Idaho. These letters and EPA's response are contained in the docket. An April 5, 1995, letter from Wally N. Cory, IDEQ Administrator, to EPA clarified that Idaho did not intend for its submittal to address jurisdictional issues over Tribal lands.

Because Idaho has neither claimed nor demonstrated authority to implement and enforce its operating permits program for sources located within the exterior boundaries of Indian Reservations, EPA proposes that interim approval of the Idaho operating permits program not extend to any lands within the exterior boundaries of any Indian Reservation in Idaho.[1] *See* 59 FR 55813, 55815–55817 (Nov. 9, 1994) (detailed discussion of EPA's views on implementation of title V programs on Tribal lands). Title V sources located within the exterior boundaries of Indian Reservations in Idaho will be subject to the Federal operating permits program, to be promulgated at 40 CFR part 71 (proposed at 60 FR 20804 (April 27, 1995)), or subject to the operating permits program of any Tribe approved after issuance of regulations under 301(d) of the Clean Air Act authorizing EPA to treat Tribes in the same manner as States for appropriate Clean Air Act provisions (proposed at 59 FR 43956 (August 25, 1994)).[2]

c. Program Implementation

There are several areas where the Idaho program does not directly address certain requirements of part 70, but EPA believes either that: (1) The Idaho program, as a whole, satisfies the requirements of part 70 in that particular respect, or (2) no changes are currently required to the Idaho program to comply with part 70, but that changes will likely be required some time in the future.

i. Applicability. With one exception discussed below in the list of proposed interim approval issues, the Idaho operating permits program currently meets the requirements of 40 CFR 70.2 and 70.3 regarding sources subject to the program. See IDAPA 16.01.01.006.99 (definition of ''Tier I source''); 16.01.01.008.14 (definition of ''major facility''); 16.01.01.006.35 (definition of ''facility''). EPA notes, however, two additional areas in which Idaho's rules regarding applicability differ from the

[1] This is not a determination that Idaho could not possibly demonstrate jurisdiction over sources within the exterior boundaries of Indian Reservations in Idaho. The State has made no such showing, however. In addition, a December 18, 1985, memorandum from Cheryl Koshuta, Deputy Attorney General of Idaho, to Ken Brooks, Air Quality Bureau Chief, states that ''only the federal government and the Indian tribes have jurisdiction to enforce environmental regulations on Indian reservations; state regulations do not apply.''

[2] Tribes may also have inherent sovereign authority to regulate air pollutants from sources on Tribal lands.

requirements of part 70 and will require revision at some later date. First, part 70's definition of ''major source'' includes a ''major source'' of radionuclides, as specified by EPA by rule. The Idaho definition of ''major facility'' in IDAPA 16.01.01.008.14 does not include a comparable provision. EPA has not yet promulgated a rule defining a ''major source'' of radionuclides. This deficiency in Idaho's program will therefore have no immediate effect on the applicability of Idaho's title V operating permits program. At such time as EPA promulgates a definition of a ''major source'' of radionuclides, however, Idaho must revise its rules to incorporate the EPA definition.

In addition, part 70 requires the permitting of any source in a source category designated by EPA pursuant to 40 CFR 70.3. *See* 70.3(a)(5). The Idaho rules require the permitting of any source in a source category designated by the Department. *See* IDAPA 16.01.01.006.99.e. At this time, EPA has not designated any additional sources for permitting under 40 CFR 70.3. At such time as EPA makes such a designation, however, Idaho will be required to revise its program to cover sources so designated in order to maintain title V approval.

ii. Applicable requirements. Part 70 requires all ''applicable requirements'' to be included in a permit application and permit, and defines ''applicable requirement'' to include, among other things, any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Clean Air Act that implements the relevant requirements of the Act. *See* 40 CFR 70.2. Idaho has defined ''applicable requirements'' to include ''Any standard or other requirement provided for in the applicable state implementation plan, including any revisions to that plan that are specified in 40 CFR Parts 52.70 though 52.690.'' *See* IDAPA 16.01.01.008.05.b. EPA interprets this definition as including as applicable requirements all provisions promulgated by EPA under title I of the Act (known as Federal Implementation Plans or ''FIPs''), because it references all of the plan provisions applicable in Idaho, not just 40 CFR 52.679, which only lists the provisions of the Idaho SIP. In any event, there is currently only one FIP in effect in Idaho, a control strategy for sulfur oxides that applies to The J.R. Simplot Company's facility in Power County, Idaho. *See* 40 CFR 52.675. If, during program implementation, Idaho issues a permit to the Simplot facility that does not include the applicable provisions of 40 CFR 52.675, EPA would have the authority to object to issuance of the permit on the grounds that the permit was not in compliance with applicable requirements. *See* 40 CFR 70.8(c).

iii. Acid rain permits. The Idaho program does not specifically require a title V permit to include a statement that, where an applicable requirement of the Act is more stringent than an applicable requirement of regulations promulgated under title IV (the acid rain program), both provisions shall be incorporated into the permit and shall be enforceable by EPA. *See* 40 CFR 70.6(a)(1)(ii). IDAPA 16.01.01.322.03, however, specifically requires that a title V operating permit in Idaho contain at least one permit term or condition for every applicable requirement specifically identified in the application. In addition, IDAPA 16.01.01.322.16.m.iv requires a title V permit to specifically state that nothing in the permit shall alter or affect the applicable requirements of the acid rain program consistent with 42 U.S.C. 7651g(a). EPA believes that these provisions are together adequate to meet the requirement of 40 CFR 70.6(a)(1)(ii).

iv. Group processing of minor permit modifications. Part 70 allows a permitting authority to process as a group certain categories of applications for minor permit modifications at a single source. *See* 40 CFR 70.7(e)(3). 70.7(e)(3)(iii) requires the permitting authority to notify EPA and affected States of requested permit modifications on a quarterly basis or within five business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the approved threshold levels. The Idaho program contains procedures for group processing of minor permit modifications. *See* IDAPA 16.01.01.385.07. Idaho regulations, however, give the Department five business days in which to identify the permit modifications that will be processed as a group and then requires the Department to notify EPA and affected States of the modifications ''promptly thereafter.'' *See* IDAPA 16.01.01.385.07.d. EPA proposes to give full approval to this aspect of Idaho's group processing procedures because EPA believes that Idaho's regulations are substantially equivalent to the requirements of part 70 in this respect, as required by 40 CFR 70.7(e)(1). EPA will review the Idaho program during implementation, however, to ensure that Idaho is ''promptly notifying'' EPA and affected States of minor modifications processed as a group.

v. Variances. IDAPA 16.01.01.140 to -.149 establish procedures for the granting of variances under certain conditions from compliance with State air pollution control rules. EPA has previously disapproved these provisions as part of the Idaho SIP. *See* 58 FR 39466 (July 23, 1993). EPA regards IDAPA 16.01.01.140 to -.149 as wholly external to the program submitted by the State of Idaho for approval under part 70, and consequently proposes to take no action on these provisions of State law in this rulemaking. EPA does not recognize the ability of a permitting authority to grant relief from the duty to comply with a Federally-enforceable title V permit, except where such relief is granted through procedures allowed by part 70. In other words, a variance does not affect the title V source until the title V permit is modified pursuant to procedures approved under part 70. EPA reserves the right to enforce the terms of the title V permit where the permitting authority purports to grant relief from the source's duty to comply with a title V permit in a manner inconsistent with procedures approved under part 70. A title V permit may also incorporate, via part 70 permit issuance or modification procedures, a schedule of compliance incorporated into a variance. EPA reserves the right, however, to pursue enforcement of applicable requirements notwithstanding the existence of a compliance schedule in a permit to operate. This is consistent with 40 CFR 70.5(c)(8)(iii)(C), which states that a schedule of compliance ''shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.''

3. Permit Fee Demonstration

Section 502(b)(3) of the Clean Air Act requires each permitting authority to collect fees sufficient to cover all reasonable direct and indirect costs necessary for the development and administration of its title V operating permit program. Each title V program submittal must contain either a detailed demonstration of fee adequacy or a demonstration that aggregate fees collected from title V sources meet or exceed $25 per ton of emission per year (adjusted from 1989 by the Consumer Price Index). *See* 40 CFR 70.4(b)(7); 40 CFR 70.9. The adjusted amount is currently $30.07. The $30.07 per ton is presumed, for purposes of program approval, to be sufficient to cover all reasonable program costs and is thus referred to as the ''presumptive minimum.''

The Idaho fee program requires that title V sources pay an annual registration fee of thirty dollars per ton of oxides of sulfur, oxides of nitrogen, particulate matter, volatile organic compounds, and five dollars per curie of radionuclides. There is relief from fees for fugitive emissions and for hazardous air pollutants (other than radionuclides) but no relief for emissions in excess of 4,000 tons per year. *See* IDAPA 16.01.01.525 to .538. The State submittal included a demonstration that this program will result in the collection of fees equivalent to $31.58 per ton of regulated air pollutant and, therefore, meets the presumptive minimum requirement of 40 CFR 70.9.

The State also included in their submittal a detailed resource needs and financial analysis study for Idaho's Air Quality Program which includes its title V program. This study concluded that permit fees should be set at between $55 and $71 per ton of pollutant in order to meet the full cost of the title V program. 40 CFR 70.9(5) directs the Administrator to require the State to provide a detailed accounting that its fee schedule will cover the permit program costs if there are serious questions regarding the sufficiency of the fee program to cover all permit program costs. Since there were many uncertainties in the State study, EPA has not concluded that this study alone is sufficient to raise serious questions. However, EPA will closely monitor the adequacy of the State's fee program during implementation to assure that adequate fees are collected.

4. Provisions Implementing the Requirements of Other Titles of the Act

a. Authority for Section 112 Implementation

In its program submittal, Idaho demonstrates adequate legal authority to implement and enforce all section 112 requirements through the title V permit. Idaho defines the term ''applicable requirement'' to include, among other things, all standards under section 112 of the Clean Air Act. IDAPA 16.01.01.008.05.d. All title V permit applications are required to cite and describe all applicable requirements and all title V permits issued by the State are required to include conditions that assure compliance with all applicable requirements. IDAPA 16.01.01.314.06; 16.01.01.322.01.

b. Program for Delegation of 112 Standards as Promulgated

The requirements for part 70 program approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a State program for delegation of section 112 standards promulgated by EPA as they apply to title V sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA also proposes to grant approval, under section 112(l)(5) and 40 CFR 63.91, of Idaho's program for receiving delegation of section 112 standards that are unchanged from the Federal standards as promulgated. This approval applies to future standards but is limited to sources covered by Idaho's title V program. In addition, EPA proposes delegation of all existing standards and programs under 40 CFR parts 61 and 63 for title V sources.[3] Under this approval, Idaho will automatically assume delegation of future section 112 standards for title V sources. Details of this delegation mechanism will be set forth in an implementation agreement to be negotiated before final program approval.

c. Implementation of Title IV of the Act

In its program submittal, Idaho demonstrates adequate legal authority to implement title IV of the Clean Air Act through the title V permit. Idaho defines the term ''applicable requirement'' to include, among other things, any standard or other requirement of the acid rain program under title V of the Act. IDAPA 16.01.01.008.05.e. As discussed above, all title V permit applications are required to cite and describe all applicable requirements and all title V permits issued by the State are required to include conditions that assure compliance with all applicable requirements.

As discussed below under ''Options for Program Approval and Implications,'' IDAPA 16.01.01.301.02.b.ii does not require Phase II sources to obtain a title V permit until June 1, 1999, in direct conflict with the Federal requirement that Phase II sources obtain permits by December 31, 1997 (*See* section 408(d)(3) of the Act). Because Idaho has the discretion to issue permits to Phase II sources prior to June 1, 1999, and has committed to meeting the Federal permitting deadline, EPA does not consider this conflict between the State and Federal permitting deadlines to be a disapproval issue. EPA proposes, however, that Idaho must correct this inconsistency as a condition of full approval.

B. Options for Program Approval and Implications

1. Proposed Disapproval

EPA believes that the excess emissions provisions and administrative amendment provisions of Idaho's title V program require disapproval of the program for the following reasons.

a. Excess Emissions

IDAPA 16.01.01.326 to .332 establishes procedures and requirements related to excess emissions for title V sources in Idaho. With the exception of IDAPA 16.01.01.332, which provides an affirmative defense for emissions in excess of a technology-based permit limit due to ''emergency'' as authorized by 40 CFR 70.6(g), Idaho's excess emissions provisions for title V sources go well beyond what is authorized by part 70. For example, IDAPA 16.01.01.328 requires Idaho to incorporate into a permit all startup, shutdown and scheduled maintenance procedures if it determines that such procedures are consistent with good air pollution control practices, will minimize emissions during such period to the extent practicable and that no adverse health impact on the public will occur. IDAPA 16.01.01.329 contains a similar provision for excess emissions due to upsets and breakdowns. IDAPA 16.01.01.327.02 then allows a permittee to exceed emission limits in applicable requirements if the permittee demonstrates that the excess emissions were caused by startup, shutdown, scheduled maintenance, upset or breakdown and follows certain other procedures. Because the Idaho program requires that these provisions be included in title V permits, EPA believes that title V permits in Idaho will not assure compliance with all applicable requirements. This is a requirement for interim approval of a State operating permits program. *See* 40 CFR 70.4(c)(1) and 70.4(d)(3)(ii). EPA therefore believes that it must disapprove Idaho's program unless it demonstrates that its excess emissions provisions for title V sources are consistent with the requirements of part 70.

[3] The radionuclide National Emission Standards for Hazardous Air Pollutant (NESHAP) is a section 112 regulation and therefore, also an applicable requirement under the State operating permits program for part 70 sources. There is not yet a Federal definition of ''major'' for radionuclide sources. Therefore, until a major source definition for radionuclide is promulgated, no source would be a major section 112 source solely due to its radionuclide emissions. However, a radionuclide source may, in the interim, be a major source under part 70 for another reason, thus requiring a part 70 permit. EPA will work with the State in the development of its radionuclide program to ensure that permits are issued in a timely manner.

b. Administrative Amendments

Part 70 allows the requirements of a preconstruction permit to be incorporated into a title V permit by administrative amendment, provided that such a preconstruction permit is issued under an EPA-approved program that meets procedural requirements substantially equivalent to the part 70 procedures for public, affected State and EPA review that apply to permit modifications and compliance requirements substantially equivalent to those required for part 70 permits. *See* 40 CFR 70.7(d)(1)(v). The Idaho program allows the incorporation of terms of preconstruction permits by administrative amendment. *See* IDAPA 16.01.01.384.01.a.v. There is no requirement, however, that preconstruction permits incorporated by administrative amendment contain compliance requirements substantially equivalent to the requirements of a title V permit. Therefore, title V permits modified by administrative amendments through the incorporation of preconstruction permits would not be required to assure compliance with all applicable requirements, which is a requirement for interim approval of a State operating permits program. *See* 40 CFR 70.4(c)(1) and 70.4(d)(3)(ii). Accordingly, EPA believes that it must disapprove Idaho's program unless Idaho demonstrates that terms of preconstruction permits incorporated into a title V permit by administrative amendment must contain compliance requirements substantially equivalent to the requirements of a title V permit.[4]

2. Proposed Interim Approval

Idaho has advised EPA that it intends to revise its regulations governing excess emissions and administrative amendments in order to make them consistent with the requirements of part 70 before EPA takes final action on this proposal. Based on this assurance, EPA is proposing in the alternative to grant interim approval to the Idaho program. If promulgated, Idaho must address to EPA's satisfaction the following issues in order to receive full approval.

a. Applicability

The definition of major source in 40 CFR 70.2 requires that fugitive emissions of a stationary source be considered in determining if a source is a major stationary source under section 302(j) of the Clean Air Act if the source is in a source category regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category. The comparable provision of Idaho's regulations requires that fugitive emissions of such sources be counted only if the source category was regulated by such a standard promulgated as of August 7, 1980, and then only to the extent that the *fugitive emissions* of such sources are regulated in those source categories. *See* IDAPA 16.01.01.008.14.h.iii. Although EPA has proposed a change to the part 70 rules that would make the definition of ''major source'' in 40 CFR 70.2 consistent with the August 7, 1980, limitation in the Idaho rule, *see* 59 FR 44460, 44527 (August 29, 1994), EPA has not yet taken final action on that proposed change. If EPA finalizes its proposed revision to the definition of ''major source'' before the end of Idaho's interim approval period, Idaho will no longer be required to revise its definition of ''major facility'' to delete the ''August 7, 1980,'' limitation. In any case, however, Idaho must revise the reference to ''fugitive emissions'' in IDAPA 16.01.01.008.14.h.iii to refer instead to any ''air pollutant.'' As currently drafted, the Idaho definition would require that fugitive emissions be considered in determining whether a source is a title V source only if the standard in question regulates fugitive emissions at that source, whereas part 70 requires fugitive emissions to be considered if the standard in question regulates any air pollutant from that source.

The State of Idaho has stated that it is ''not aware of any sources'' that would be considered a major source, and thus a title V source under part 70, but would not be required to obtain a permit under Idaho's title V program. In addition, one of the deficiencies in Idaho's definition of ''major facility'' may be eliminated through proposed revisions to part 70 in the next 2 years. EPA therefore believes that Idaho's program may be granted source category-limited interim approval, rather than disapproval, based on the deficiency in the Idaho definition of ''major facility.'' *See* 57 FR 32250, 32270 (July 21, 1992). If EPA takes final action on this proposal, Idaho must demonstrate to EPA's satisfaction by the end of the interim approval period that its program covers all sources required to be permitted under part 70.

b. Temporarily Exempt Sources

Part 70 allows States to defer the permitting of sources that would otherwise be subject to part 70 but that are not major sources, affected sources (sources subject to the acid rain provisions of title IV of the Act) or solid waste incineration units required to obtain a permit under section 129(e) of the Act until such time as EPA conducts additional rulemaking. *See* 40 CFR 70.3(b)(1). Idaho rules, however, allow the State to defer the permitting of acid rain sources (known as ''Phase II sources'' in Idaho) and sources subject to title V solely because of a solid waste incineration unit until June 1, 1999. *See* IDAPA 16.01.01.301.02.b. Idaho rules also allow sources subject to title V solely because of a solid waste incineration unit until January 1, 1998, to file an application for a title V permit. *See* IDAPA 16.01.01.313.01.b. Idaho's submittal states that this deferral will have a minimal impact in Idaho for several reasons. With respect to Phase II sources, IDAPA 16.01.01.313.01.3 requires permit applications for such sources to be submitted by January 1, 1996, for sulfur dioxide and by January 1, 1998, for nitrogen oxides and IDAPA 16.01.01.367.05 provides that the permitting of Phase II sources shall occur in accordance with the deadlines specified in the Clean Air Act. The Attorney General has opined that IDAPA 16.01.01.367 gives Idaho the discretion to issue permits to Phase II sources within the time periods required by part 70. The State has advised EPA that there is currently only one Phase II source in Idaho, that the facility intends to submit a timely application to receive an operating permit prior to the Federally-mandated date of December 31, 1997, and that the State intends to meet the permitting deadlines required by part 70 for Phase II sources notwithstanding IDAPA 16.01.01.301.02.b.ii.

With respect to sources subject to title V solely because of a solid waste incineration unit, the Attorney General opines that the State has the authority under IDAPA 16.01.01.313.01 to require earlier submittal of title V applications for such sources. In addition, Idaho has advised EPA that there are no sources in Idaho which are currently subject to any solid waste incineration rules promulgated pursuant to section 129 of the Act and that, if any such sources are discovered, Idaho intends to meet the application and permitting deadlines required under part 70 for such sources.

Based on these opinions and commitments, EPA agrees that the impact of the difference between Idaho law and part 70 with respect to the permitting of Phase II sources and sources with solid waste incineration units is likely to be minimal during the

[4] As discussed below, an additional change appears to be necessary to the Idaho provision authorizing administrative amendments, IDAPA 16.01.01.01.01.384, before EPA can give full approval to the Idaho program.

interim approval period and that these difference to do not pose a bar to interim approval. As a condition of full approval, however, EPA proposes that Idaho be required to demonstrate to EPA's satisfaction that the application and permitting deadlines for Phase II sources and sources with solid waste incineration units meet the requirements of part 70.

c. New Sources

Part 70 requires title V sources applying for a permit for the first time to submit a permit application within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish. *See* 40 CFR 70.5(a)(1)(i). IDAPA 16.01.01.313 ties the date by which a title V source is required to submit an application to whether the source was in existence on or before May 1, 1994. Sources existing before that date are, subject to certain exceptions, required to submit an application by the earlier of January 1, 1996, and 12 months after EPA approval of Idaho's program. Sources that become title V sources ''due to construction, reconstruction or modification'' after May 1, 1994, are, subject to certain extensions, required to submit an application within 12 months of commencing operation. IDAPA 16.01.01.313.01. The Idaho regulations do not appear to include a permit application date for sources that become subject to title V after May 1, 1994, by means other than construction, reconstruction or modification, such as relaxation of a limit on potential to emit or by EPA lowering a threshold for determining major source status.

Again, Idaho asserts that this gap will have a minimal impact in Idaho because there are few sources that will become subject to title V through something other than construction, reconstruction or modification, the State is authorized to set permit application deadlines for sources and the State intends to require a permit application from any source that becomes subject to title V in this manner within 12 months after such source becomes subject to title V. Based on these assurances, EPA believes that this gap in the application submission dates does not pose a bar to interim approval of the Idaho program, but that, in order to receive full approval, Idaho must demonstrate to EPA's satisfaction that all sources in Idaho applying for a title V permit for the first time are required to submit a permit application within 12 months after becoming subject to title V.

d. Option to Obtain Permit

Part 70 requires States to allow any source exempt under 40 CFR 70.3(b) to opt to obtain a part 70 permit. *See* 40 CFR 70.3(b)(3). Idaho has no comparable provision and the State has not demonstrated that it has authority to issue title V permits to exempt sources. Few, if any, exempt sources would be expected to apply for a title V permit in Idaho, however, because Idaho's Tier II operating permit program provides sources with a mechanism for obtaining Federally-enforceable operating permit limits through a means other than a title V permit. *See* 16.01.01.400-.499. As a condition of full approve, EPA proposes that Idaho demonstrate to EPA's satisfaction that it has the authority required by 40 CFR 70.3(b)(3).

e. Fugitive Emissions

Part 70 requires that fugitive emissions from part 70 sources be included in permit applications and permits in the same manner as stack emissions regardless of whether the source category in question is included in the list of sources contained in the definition of major source. *See* 40 CFR 70.3(d). The Idaho regulations do not contain such a provision, and EPA proposes that Idaho address this requirement of part 70 as a condition of full approval.

f. Insignificant Activities

Part 70 authorizes EPA to approve as part of a State program a list of insignificant activities and emissions levels which need not be included in the permit application, provided that an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the EPA-approved schedule. IDAPA 16.01.01.317 contains criteria for identifying insignificant activities and consists of one list of units and activities that are defined as ''categorically exempt'' and may be omitted from the permit application, and another list of units and activities that are defined as ''insignificant'' based on size or production rate, but must be listed in the permit application. Importantly, that provision includes a so-called ''gatekeeper,'' which expressly states that no emission unit or activity subject to an applicable requirement, such as an opacity standard, may qualify as an insignificant emission unit or activity under Idaho's rules. *See* IDAPA 16.01.01.317.01.

EPA believes that, notwithstanding the gatekeeper, full approval of the lists contained in IDAPA 16.01.01.317 is inappropriate for several reasons. First, the lists use many terms and acronyms that do not appear to be defined in regulation or in guidance and Idaho has provided insufficient documentation that the units and activities included on the lists are appropriate for industries in Idaho. This will make the regulation very difficult, if not impossible, to implement. As an example, IDAPA 16.01.01.317.01.a.52 lists as a categorically insignificant activity ''materials and equipment used by, and activity related to operation of infirmary; infirmary is not the source's business activity.'' This provision could be interpreted to apply to and thus impermissibly exclude from the permit application activities subject to the radionuclide NESHAP. Similarly, IDAPA 16.01.01.317.01.a.54.d. and -317.01.a.65 define as categorically exempt certain units and activities with ''de minimis'' emissions. Again, the term ''de minimis'' is not defined. Second, IDAPA 16.01.01.317.01.a.54.d., -317.01.a.65 and -317.01.a.122 must be moved to IDAPA 16.01.01.317.01.b, which requires the identified units and activities to be listed in the application, because whether these units and activities are ''insignificant'' depends on size or production rate. Finally, IDAPA 16.01.01.317.01.b.29 defines as insignificant ''[a]ny other activity that is requested to be listed as insignificant by the applicant and agreed to by the department.'' Such a ''director's discretion'' provision is contrary to the requirement of 40 CFR 70.5(c) that EPA approve the activities and emissions limits defined as ''insignificant'' by the State because it gives the Director completes discretion to determine on a case-by-case basis that a particular activity is ''insignificant.'' EPA does not believe that these problems with Idaho's list of insignificant activities preclude interim approval of the Idaho program, however, because the ''gatekeeper'' provision of IDAPA 16.01.01.317.01 adequately assures that Idaho has authority to issue permits that assure compliance with all applicable requirements to subject sources during the interim approval period, as required by 40 CFR 70.4(d)(3)(ii) and 70.6(a)(1). EPA proposes that Idaho must address these identified issues with its designation and definition of insignificant activities, however, as a condition of full approval.

g. Permit Content

Part 70 requires that the permitting authority include in a title V permit all emission limitations and standards, including those operational

requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. *See* 40 CFR 70.6(a)(1). IDAPA 16.01.01.322.01 and 16.01.01.322.03 qualify this requirement in that they require inclusion of only those requirements that are ''identified in the application'' at the time of permit issuance. This qualification impermissibly relieves the permitting authority from including in a permit applicable requirements that are not identified in a permit application. EPA believes that this qualification must be revised before the Idaho program qualifies for full approval. EPA does not believe this deficiency precludes interim approval, however, because sources are obligated under the Idaho program to include all applicable requirements affecting the source in the permit application, IDAPA 16.01.01.314.06, and are obligated to supplement and correct a permit application upon becoming aware that an application contains incorrect information or omits necessary information. EPA believes that these provisions minimize the likelihood that applicable requirements will be omitted from the permit during the interim approval period and that the Idaho program therefore provides the State with adequate authority to issue permits that assure compliance with the requirements of 40 CFR 70.4(c)(1), as required by 40 CFR 70.4(d)(3)(ii).

h. Exemption From Applicable Requirements

IDAPA 16.01.01.325.01.c allows Idaho to exempt sources from otherwise applicable requirements provided the source submits specified information, the exemption is included in the title V permit, the Department has determined in writing that the permittee should be exempted and the title V permit includes a concise summary of the Department's determination. Although part 70 authorizes a permitting authority to determine that a certain requirement is inapplicable to a source and to provide a source with a shield from a later determination that the source was subject to such requirement, part 70 does not authorize a permitting authority to exempt a source from otherwise applicable requirements. EPA proposes that, as a condition of full approval, Idaho must eliminate this provision or demonstrate to EPA's satisfaction that this provision is consistent with the requirements of part 70. EPA does not believe this deficiency precludes interim approval, however, because the State is not required to grant such exemptions and EPA believes it would have the authority to veto any title V permit issued by Idaho that purported to exempt a source from an otherwise applicable requirement. *See* 40 CFR 70.8(c)(EPA will object to the issuance of any proposed permit determined by EPA not to be in compliance with applicable requirements).

i. Emissions Trading

Part 70 requires a permitting authority, if a permit applicant so requests, to issue permits allowing for the trading of increases and decreases within the permitted facility solely for the purposes of complying with a Federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. *See* 40 CFR 70.4(b)(12)(iii). The Idaho program authorizes the permitting authority to issues permits containing emissions trading provisions. *See* IDAPA 16.01.01.322.05 and 16.01.01.383.01.a.iii. The Idaho program does not require, however, an applicant requesting a permit with emissions trading provisions to include in its permit application proposed replicable procedures and permit terms that ensure emission trades are quantifiable and enforceable, as required by 40 CFR 70.4(b)(12)(iii). Nor does the Idaho program require the permitting authority to include in the emissions trading provisions only those emission units for which emissions are quantifiable and for which there are replicable procedures to enforce the emissions trades, as is also required by that section. Finally, the Idaho regulations do not appear to require each permit to state that no permit revision is required, under any approved economic incentives, marketable permits, emissions trading or other similar programs or processes for changes that are provided for in the permit, as is required by 40 CFR 70.6(a)(8). As a condition of full approval, EPA proposes that Idaho be required to demonstrate that its emissions trading provisions meet the requirements of 40 CFR 70.4(b)(12)(iii) and 40 CFR 70.6(a)(8). EPA also recommends that the requirement of IDAPA 16.01.01.322.05 that the company contemporaneously record in a company log a change from one trading scenario to another be specifically referred to in the list of requirements a source must meet in IDAPA 16.01.01.383.03 in order to make a ''Type II'' permit deviation.

j. Alternative Emission Limits

Part 70 requires that, if an applicable implementation plan allows a determination of an alternative emission limit, equivalent to that contained in the plan, to be made in the permit issuance, renewal or significant modification process and the State elects to use such process, any permit containing such an equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable and based on replicable procedures. *See* 40 CFR 70.6(a)(1)(iii). Although the Idaho regulations require such permit terms for permits with emission trading provisions, see IDAPA 16.01.01.322.05, there is no such requirement for permits in which alternative emission limits are established. As a condition of full approval, EPA proposes that the State be required to demonstrate to EPA's satisfaction that its operating permit program meets the requirements of 40 CFR 70.6(a)(1)(iii).

k. Reporting of Permit Deviations

Part 70 requires that each permit require the prompt reporting of deviations [5] from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations and any corrective actions or preventative measures taken, and authorizes the permitting authority to define ''prompt'' in relation to the degree and type of deviation likely to occur and the applicable requirement. *See* 40 CFR 70.6(a)(3)(iii)(B). Although the Idaho regulations contain detailed requirements for defining, limiting, and reporting permit deviations due to excess emissions caused by startup, shutdown, scheduled maintenance, upset or breakdown, *see* IDAPA 16.01.01.326 to –332, they do not address other permit deviations. In order to receive full approval, EPA proposes that the Idaho program must be revised to require prompt reporting of deviations from all permit requirements.

l. Acid Rain Provisions

Part 70 requires a permit to state that no permit revision is required for increases in emissions that are

[5] The Idaho regulations use the term ''permit deviation'' to refer to certain changes authorized by the permit flexibility provisions contained in 40 CFR 70.6 (9) and (10) and section 502(b)(10) of the Act. *See* IDAPA 16.01.01.383. The part 70 regulations use the term ''permit deviation'' to refer to permit violations. *See* 40 CFR 70.6(a)(3)(iii)(B). This notice uses the term ''permit deviation'' in the same way as the part 70 regulations.

authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit revision under any other applicable requirement. *See* 40 CFR 70.6(a)(4)(i). The Idaho regulations do not appear to contain a comparable provision. EPA proposes that Idaho must revise its regulations to address the requirements of 40 CFR 70.6(a)(4)(i) in order to obtain full approval.

m. State-Only Enforceable Requirements

Part 70 requires the permitting authority to specifically designate as not being Federally enforceable under the Clean Air Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. *See* 40 CFR 70.6(b)(2). The Idaho regulations require a permit to state that provisions specifically identified as ''State Only'' are enforceable only by the Department and not by EPA. *See* 16.01.01.322.16.k. The Idaho regulations, however, do not specify which provisions shall be designated as ''State Only,'' that is, that Idaho shall designate as ''State Only'' those provisions that are not required under the Act or under any of its applicable requirements. In order to receive full approval, EPA proposes that Idaho be required to revise its regulations to define ''State Only'' provisions in a manner consistent with 40 CFR 70.6(b)(2).

n. General Permits

Part 70 allows States to issue a ''general permit,'' which is a permit issued after notice and opportunity for public participation, that covers numerous similar sources. *See* 40 CFR 70.6(d). The Idaho program includes regulations authorizing the issuance of general permits. *See* IDAPA 16.01.01.335. These regulations fail to comply with the requirements of part 70, however, in several respects. First, part 70 requires that, if a permitting authority has issued a general permit, the permitting authority must grant the conditions and terms of the general permit to sources that qualify. *See* 40 CFR 70.6(d)(1). The Idaho program does not contain a comparable requirement. Second, part 70 allows permitting authorities to provide for applications for general permits which deviate from the requirements of 40 CFR 70.5, provided that such applications otherwise meet the requirements of title V. The Idaho regulations allow for specialized applications for general permits, but do not require that such specialized applications meet the requirements of title V. *See* IDAPA 16.01.01.335.02.c. Third, part 70 allows the permitting authority to grant a source's request for authorization to operate under a general permit without repeating the public participation procedures, provided that such grant shall not be a final permit action for purposes of judicial review. *See* 40 CFR 70.6(d)(2). IDAPA 16.01.01.335.05, however, provides that the issuance of authorization to operate under a general operating permit is a final agency action for purposes of administrative and judicial review. This directly conflicts with the requirements of 40 CFR 70.6(d)(2). Finally, section 70.6(d)(1) provides that, notwithstanding the shield provisions of 40 CFR 70.6(f), a source shall be subject to enforcement action for operation without a permit if the source is later determined not to qualify for the conditions and terms of the general permit. IDAPA 16.01.01.335.06 limits this requirement by stating that the source is subject to enforcement action in such a case only if the source submitted an incomplete or inaccurate application. In order to receive full approval, EPA proposes that Idaho must revise its regulations authorizing general permits to be consistent with 40 CFR 70.6(d).

o. Operational Flexibility

Part 70 requires permit programs to include certain ''operational flexibility'' provisions and authorizes permit programs to include certain other ''operational flexibility'' provisions in an approved title V program. *See* 40 CFR 70.4(b)(12). These provisions allow a source to make certain types of changes without a permit modification but require the permittee to provide notice of the change to EPA and the permitting authority, and require the permittee, the permitting authority and EPA to each attach a copy of such notice to the relevant permit. The Idaho program meets all of the requirements of 40 CFR 70.4(b)(12), except that neither the Idaho regulations nor the rest of the program submittal require or commit the State of Idaho to attach a copy of any such notice to the relevant permit. In order to receive full approval, EPA proposes that Idaho address this requirement to EPA's satisfaction.

p. Off-Permit Provisions

Part 70 authorizes an approved permit program to include certain ''off-permit'' provisions whereby a source can make a change at the permitted facility without the need for a permit revision. *See* 40 CFR 70.4(b)(14) and (15). These provisions require the permittee to keep a record at the facility describing each off-permit change and to provide ''contemporaneous'' notice of each off-permit change to EPA and the permitting authority. *See* 40 CFR 70.4(b)(14). The Idaho program authorizes off-permit changes, and allows a source seven days in which to make a record at the facility describing the change and to provide written notice to Idaho and EPA. *See* IDAPA 16.01.01.382.02. EPA believes that seven days qualifies as ''contemporaneous,'' within the meaning of 40 CFR 70.4(b)(14)(ii), and is an acceptable period of time to allow a source to report an off-permit change to EPA and the permitting authority. EPA also believes, however, that 40 CFR 70.4(b)(14)(iv) requires a source to record an off-permit change in a log at the time the change is being implemented and does not allow a permitting authority to afford a source seven days in which to record an off-permit change in the facility log. EPA therefore proposes that, in order to receive full approval, Idaho must revise its regulations to require a source to record an off-permit change in a log at the facility on the same day that the change is made.

q. Permit Renewals

Part 70 defines a timely application for a permit renewal as one that is submitted at least six months prior to the date of permit expiration or such longer time as may be approved by EPA, but not to exceed 18 months. *See* 40 CFR 70.5(a)(iii). The Idaho regulations define a timely application for a permit renewal as one that is submitted at least nine months prior to the date of permit expiration. *See* IDAPA 16.01.01.313.03. The Idaho regulations do not place a limit, however, on how long before permit expiration a source may submit an application for a permit renewal. EPA agrees that nine months prior to permit expiration is an appropriate deadline for the submission of renewal applications in the State of Idaho. In order to receive full approval, however, EPA proposes that Idaho be required to revise its regulations to ensure that an application for a permit renewal will not be considered timely if it is filed more than 18 months before permit expiration.

r. Completeness Determination

Part 70 requires that a permit application be deemed complete within 60 days of receipt unless the permitting authority determines in that period that the application is not complete or requests additional information. *See* 40 CFR 70.5(a)(2) and 70.7(a)(3). The Idaho regulations meet this requirement except for permit applications which were due before the effective date of

EPA approval of Idaho's program but were not subject to a specific deadline established by the Department under IDAPA 16.01.01.313.01. *See* IDAPA 16.01.01.361.02.a.ii. The Department is required to make completeness determinations for these permit applications as promptly as practicable or within 90 days of EPA approval of Idaho's title V program, whichever is earlier, but Idaho's regulations do not specify a date by which such applications will be deemed complete. In order to obtain full approval, EPA proposes that Idaho be required to revise its regulations to ensure that applications will be deemed complete within 60 days of receipt for all sources or establish to EPA's satisfaction that no sources will in fact fall within the exception of IDAPA 16.01.01.361.02.a.ii.

s. Administrative Amendments

In addition to the deficiency in Idaho's administrative amendment procedures discussed above, which EPA believes compels disapproval if not addressed before final action, there is one other deficiency in Idaho's administrative amendment procedures which EPA believes must be addressed for full approval. 40 CFR 70.7(d)(1)(vi) authorizes EPA to approve as appropriate for incorporation by administrative amendment other types of changes which are similar to those specifically enumerated in 40 CFR 70.7(d)(1). The Idaho program allows sources to incorporate into a title V permit by administrative amendment terms and conditions consistent with a compliance schedule developed in accordance with IDAPA 16.01.01.322.13.d.[6] and the terms and conditions of an applicable consent order, judicial consent decree, judicial order, administrative order, settlement agreement or judgement. *See* IDAPA 16.01.01.384.01.a.vi and -vii. EPA does not believe that compliance orders, judicial consent decrees and administrative orders are similar to the other truly ''administrative'' types of changes specified in part 70 as appropriate for administrative amendment, such as a change in name or correction of a typo. *See* 40 CFR 70.7(d)(1). In addition, compliance schedules, which are required to be at least as stringent as judicial consent decrees and administrative orders, become additional ''applicable requirements'' once incorporated into a title V permit. Like any other change to an applicable requirement, they must therefore be processed as a permit modification. Accordingly, EPA proposes to require Idaho to delete these items from the list of changes in IDAPA 16.01.01.384.01.a that may be accomplished by administrative amendment in order to receive full approval.

t. Minor Permit Modifications

Part 70 requires States to establish procedures for minor permit modifications which are substantially equivalent to those set forth in 40 CFR 70.7(e). The Idaho program contains such procedures, but fails to meet the requirements of part 70 in one respect. 70.7(e)(2)(iv) prohibits a permitting authority from issuing a final minor permit modification until after the earlier of expiration of EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification, although the permitting authority can approve the minor permit modification prior to that time. IDAPA 16.01.01.385.04.c, however, requires Idaho to issue minor permit modifications prior to the end of EPA's 45-day review period if more than 60 days have elapsed since receipt of a complete permit application. As a condition for full approval, EPA proposes that Idaho must revise its rules to prohibit the issuance of any permit until after the earlier of expiration of EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification.

u. Group Processing of Minor Permit Modifications

Part 70 allows a permitting authority to process as a group certain categories of applications for minor permit modifications at a single source. *See* 40 CFR 70.7(e)(3). 70.7(e)(3)(i) establishes standard thresholds for determining whether requests for permit modifications can be grouped, but allows EPA to approve alternative thresholds, if the permitting authority can justify the alternative thresholds based on two specified criteria. In addition to establishing emissions thresholds for group processing of minor permit modification that are consistent with the Federal program, IDAPA 16.01.01.385.7.b.iv gives the Director of the Department the discretion to establish any limit, on a case-by-case basis, for which minor permit modifications may be processed as a group. The State has provided no information, however, showing that it considered the factors identified in section 70.7(e)(3)(i)(B) in setting this standard. EPA does not believe that a provision which gives the permitting authority complete discretion to establish any threshold for group processing on a case-by-case basis could ever be approvable under 40 CFR 70.7(e)(3)(i)(B). At a minimum, however, such a provision must be supported by a showing consistent with 40 CFR 70.7(e)(3)(i)(B) for alternative thresholds. In order to receive full approval, EPA proposes that Idaho be required to delete the ''director's discretion'' provision of IDAPA 16.01.01.385.07.b.iv or make a showing consistent with 40 CFR 70.7(e)(3)(i)(B) for alternative thresholds.

In addition, as with Idaho's procedures for minor modifications, Idaho's regulations regarding group processing of minor modifications fail to contain the prohibition on issuance of any such permit modification until after the earlier of expiration of EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification. EPA therefore proposes that Idaho be required to address this requirement as a condition of full approval.

v. Reopenings

Part 70 establishes minimum requirements a State must meet where EPA determines that cause exists to terminate, modify or revoke and reissue a permit. *See* 40 CFR 70.7(g). The Idaho program meets these requirements, with one exception. IDAPA 16.01.01.387.02.b requires that EPA initiate permit reopenings[7] for cause by providing written notification to the Department and the permittee that cause exists to reopen the permit, as required by 40 CFR 70.7(g)(1). That regulation goes on, however, to require that EPA include certain information in the notice that is not required by part 70, such as a brief summary of all the alterations recommended by EPA. Under the Supremacy Clause of the United States Constitution, a State regulation is invalid if it regulates the United States directly, *North Dakota* v. *United States*, 495 U.S. 423, 435 (1990), as the Idaho regulation does here by directing the EPA notice to contain certain information. EPA does not consider itself bound to issue a notice in the form and containing the information specified by IDAPA 16.01.01.387.01.b and therefore proposes to require, as a condition of full approval, that Idaho

[6] The reference in IDAPA 16.01.01.384.01.a.vi to IDAPA 16.01.01.322.13.d appears to be in error. The reference should instead be to IDAPA 16.01.01.322.*12*.d.

[7] IDAPA 16.01.01.387.01.a defines ''reopening'' to include permit termination, revocation, revision or revocation and reissuance.

revise its regulations to require that the notice contain no more information than that specified by 40 CFR 70.7(g)(1).

w. Public Participation

Part 70 requires that the permitting authority make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the Clean Air Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act, and expressly provides that the contents of a title V permit are not be entitled to confidential treatment. *See* 40 CFR 70.4(b)(3)(viii). EPA has carefully reviewed Idaho's statutory and regulatory provisions and the opinion of the Idaho Attorney General regarding confidentiality. *See* Idaho Code 9–301 to –350; Idaho Code 39–111; IDAPA 16.01.01.126; IDAPA 16.01.01.365.02; Letter from Curt A. Fransen, Deputy Attorney General, to Jon Sandoval, Acting Administrator, Division of Environmental Quality, dated January 17, 1995. Based on this review, EPA believes that Idaho's confidentiality provisions allow far more information to be kept confidential from the public than is authorized under part 70 and section 114 of the Act. First, there is no assurance under Idaho law that the terms and conditions of a title V permit will not be entitled to confidential treatment. Second, there is no assurance under Idaho law that ''emission data,'' which is defined very broadly under 40 CFR 2.301(a)(2), will not be entitled to confidential treatment. To the contrary, any such information appears to be entitled to confidential treatment under Idaho law if it relates ''to production or sales figures or to processes or production unique to the owner or operator or which tend[s] to affect adversely the competitive position of such owner or operator'' and the owner or operator follows the procedures for having such information held by the State as confidential. Finally, the Idaho standard also appears to be broader than the standard under the Clean Air Act for what information, other than emission data and permit terms, may be entitled to confidential treatment. Section 114(c) of the Clean Air Act allows a source to claim as confidential only that information which, if made public, would divulge methods or processes entitled to protection as trade secrets.

EPA is very concerned that the Idaho confidentiality provisions could substantially interfere with the public's right to participate in the issuance of title V permits to Idaho sources. EPA believes that the Idaho program can nonetheless qualify for interim approval at this time, notwithstanding its potentially restrictive confidentiality provisions. Part 70 provides that EPA will grant interim approval to any program that, among other requirements, provides for adequate public notice of and an opportunity for public comment and a hearing on draft permits and revisions, except for permits qualifying for minor permit modification. *See* 40 CFR 70.4(d)(3)(iv). EPA believes that the Idaho program meets all of the public participation requirements of part 70 except with respect to the treatment of confidential information.

In addition, there are three checks on the possibility that Idaho's confidentiality provisions will unduly interfere with the public participation requirements of part 70. First, 40 CFR 70.8(c)(1) authorizes EPA to object to the issuance of any proposed permit determined by EPA not to be in compliance with applicable requirements or the requirements of part 70. EPA intends to exercise its authority to object to issuance of a proposed permit if a source's confidentiality claims under Idaho law interfere with the public's access to information required to be available to the public under 40 CFR 70.4(b)(3)(viii). Second, pursuant to 40 CFR 70.5(a)(3), Idaho law requires sources to submit directly to EPA any information claimed as confidential under State law in connection with a title V operating permit or application. *See* IDAPA 16.01.01.126. Once in the hands of EPA, such information will be kept confidential only if it is entitled to confidential treatment under the Clean Air Act. This safety valve will provide additional assurance that the public will have access during the interim approval period to all information that the public would be able to obtain from the State of Idaho if its confidentiality provisions were consistent with the Clean Air Act. Finally, 40 CFR 70.10(c)(1)(ii) allows EPA to withdraw approval of an approved title V operating permit program if the operation of the State program fails to comply with the requirements of part 70, including failure to comply with the public participation requirements. If, during the interim approval period, Idaho's confidentiality provisions are interfering with the public's right to review and comment on permits, EPA will consider whether to withdraw program approval on this basis. In any event, in order to obtain full approval, Idaho must demonstrate to EPA's satisfaction that its restrictions on the release to the public of permits, permit applications and other related information do not exceed those allowed by 40 CFR 70.4(b)(3)(viii) and 114(c) of the Clean Air Act.

x. Permits for Solid Waste Incineration Units

Part 70 requires an opinion from the Attorney General stating that no permit for a solid waste incineration unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit. *See* 40 CFR 70.4(b)(3)(iv). The opinion of the Idaho Attorney General states, however, that the Idaho Department of Health and Welfare, the agency that issues title V permits in Idaho, is responsible for the design, construction and operation of a limited number of solid waste incineration units, namely, units in mental hospitals and other institutions run by the Department. As stated previously, however, there are currently no solid waste incineration units in Idaho that are now subject to a standard under Section 129 of the Act, and therefore subject to the title V program in Idaho. EPA therefore does not see this issue as a bar to interim approval in Idaho, but proposes to require, as a condition of full approval, that Idaho ensure that no permit for a solid waste incineration unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

y. Maximum Criminal Penalties

Part 70 requires a State to have authority to recover criminal penalties for violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspections, entry or monitoring activities; or any regulation or orders issued by the permitting authority in the maximum amount of not less than $10,000 per day per violation. *See* 40 CFR 70.11(a)(3)(ii). Idaho law authorizes criminal penalties for such violations but states that such violations are punishable by ''a fine of not more than ten thousand dollars ($10,000) for each separate violation or for each day of continuing violation.'' *See* Idaho Code 39–117(2). This appears to limit penalties to a maximum of $10,000 per day even when there is more than one violation on each day. As a condition of full approval, EPA proposes that Idaho be required to demonstrate that it has sufficient authority to recover criminal penalties in the maximum amount of not less than

$10,000 per day per violation, as required by 40 CFR 70.11(a)(3)(ii).

z. False Statements and Tampering

Part 70 also requires that criminal fines be recoverable in a maximum amount of $10,000 per day per violation against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method. *See* 40 CFR 70.11(a)(3)(iii). Idaho law does not appear to contain such authority. The Idaho Attorney General has stated that the Department has the authority to include such a prohibition in each permit and intends to do so. This authority, coupled with the general criminal provisions of Idaho Code 39–117(2), could provide sufficient authority for making knowing violations of such requirements subject to criminal liability, but only if the Department is specifically required to include such prohibitions in each title V permit. As a condition of full approval, the State must demonstrate to EPA's satisfaction that it has the criminal enforcement authorities required by 40 CFR 70.11(a)(3)(iii).

aa. Environmental Audit Statute

In 1995, the Idaho legislature enacted an environmental audit statute, which prohibits the State from compelling a source, with certain limited exceptions, to provide the State a report that meets the definition of an ''environmental audit report.'' *See* Idaho Code 9–804. The statute also grants a source immunity from civil or criminal liability for any violations voluntarily disclosed by the source to the State in an environmental audit report. *See* Idaho Code 9–809.

Although EPA is concerned that the audit privilege of Idaho Code 9–804 could be misused to shield bad actors and frustrate access to crucial factual information, EPA does not believe that the statute poses a bar to full approval of Idaho's operating permit program. As EPA has recently stated, however, EPA intends to scrutinize enforcement more closely in States, such as Idaho, with broad audit privileges to ensure such statutes do not prevent States from pursuing appropriate enforcement action and obtaining appropriate penalties. *See* 60 CFR 16875 (April 3, 1995) (Voluntary Environmental Self-Policing and Self-disclosure Interim Policy Statement). If, during program implementation, EPA determines that Idaho Code 9–804 unduly interferes with Idaho's enforcement responsibilities under part 70, EPA will consider this grounds for withdrawing program approval in accordance with 40 CFR 70.10(c).

EPA believes, however, that Idaho Code 9–809, which grants a source immunity from civil or criminal prosecution for violations discovered during an environmental audit which are voluntarily disclosed, does impermissibly interfere with the Idaho's enforcement requirements under 40 CFR 70.11 and thus poses a bar to full approval. Part 70 requires a State to have authority to recover penalties for each day of violation. By granting a source absolute immunity for certain voluntarily disclosed violations, the State has restricted its authority to collect penalties for each day of violation. EPA therefore proposes to require, as a condition of full approval, that Idaho eliminate the immunity currently granted under Idaho Code 9–809 for voluntarily disclosed violations discovered through an environmental audit report or to demonstrate to EPA's satisfaction that Idaho Code 9–809 does not impermissibly interfere with the enforcement requirements of part 70.

bb. Correction of Typographical Errors and Cross-references

The operating permit regulations submitted by the State of Idaho contain several typographical errors and erroneous cross references that could interfere with application and implementation of the Idaho operating permits program. In reviewing the Idaho program, EPA has made the following assumptions in interpreting the Idaho regulations and proposes to require, as a condition of full approval, that Idaho be required to correct these errors in order to obtain full approval.

i. IDAPA 16.01.01.006.31: The reference in the definition of ''emissions unit'' should be to 42 U.S.C. sections 7561 through 7561*o* rather than to 42 U.S.C. sections 7561 through 7561.

ii. IDAPA 16.01.01.008.05.f: The reference in subsection (f) of the definition of ''applicable requirement'' should be to 42 U.S.C. section 7661*c*(b), rather than to section 7661a(b) (i.e. to section 504(b) of the Clean Air Act rather than to section 502(b)).

iii. IDAPA 16.01.01.008.12: The reference to the general permit regulation in the definition of ''general permit'' should be to section 335 (i.e., IDAPA 16.01.01.335), rather than to 322.

iv. IDAPA 16.01.01.008.14: The reference in the definition of ''major facility'' to the definition of ''facility'' should be to section 006.35 (i.e., IDAPA 16.01.01.006.35), rather than to 006.34.

v. IDAPA 16.01.01.322.10.1.i: The reference in the requirements for the initial compliance plan should be to ''a *verifiable* sequence of actions'' rather than to ''a variable sequence of actions.''

vi. IDAPA 16.01.01.384.01.a.vi: The reference to compliance schedule in this subsection should be to section 322.12.d (i.e., IDAPA 16.01.01.322.12.d), rather than to section 322.13.d.

vii. IDAPA 16.01.01.385.01.a.iv: The words ''of Title I of the Clean Air Act'' or some other description of the type of provisions being referred to appears to have been deleted after the phrase ''as a modification under any provision.''

viii. IDAPA 16.01.01.387.02.a.iii: The word ''least'' appears to have been deleted from the phrase ''shall be sent at one (1) day.''

3. Effect of Proposed Action

a. Effect of Disapproval

If EPA were to take final action disapproving the State of Idaho's title V submittal, EPA would be required to apply one of the sanctions in section 179(b) of the Clean Air Act on the date 18 months after the effective date of the disapproval, unless prior to that date the State had submitted a revised program and EPA had determined that the revised program corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator found a lack of good faith on the part of the State, both sanctions under section 179(b) would apply after the expiration of the 18-month period until the Administrator determined that the State had come into compliance. In all cases, if, six months after EPA applied the first sanction, the State had not submitted a revised program that EPA had determined corrected the deficiencies that prompted disapproval, a second sanction would be required.

In addition, discretionary sanctions may be applied where warranted any time after EPA has disapproved a State program. Moreover, if EPA were to disapprove the State program and had not granted full approval to a corrective submittal by November 15, 1995, EPA must promulgate, administer and enforce a Federal permits program for Idaho.

b. Effect of Interim Approval

Final interim approval may be granted for up to 2 years following the effective date of final interim approval, and can not be renewed. During the interim approval period, Idaho would be protected from sanctions, and EPA would not be obligated to promulgate, administer and enforce a Federal permits program for the State of Idaho.

Permits issued under a program with interim approval have full standing with respect to part 70. In addition, the 1-year time period for submittal of permit applications by subject sources and the 3-year time period for processing the initial permit applications begins upon the effective date of interim approval.

If, following the grant of interim approval, Idaho were to fail to submit a complete corrective program for full approval by the date 6 months before expiration of the interim approval, EPA would start an 18-month clock for mandatory sanctions. If Idaho then failed to submit a corrective program that EPA found complete before the expiration of that 18-month period, EPA would be required to apply one of the section 179(b) sanctions, which would remain in effect until EPA determined that Idaho had corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of the State, both sanctions under section 179(b) would apply after the expiration of the 18-month period until the Administrator determined that the State had come into compliance. In any case, if, six months after application of the first sanction, Idaho still had not submitted a corrective program that EPA found complete, a second sanction would be required.

If, following final interim approval, EPA were to disapprove Idaho's complete corrective program, the consequences would be the same as if EPA were to disapprove, rather than to grant interim approval to, Idaho's submittal.

4. Scope of Proposed Interim Approval

If EPA grants final interim approval to the Idaho program, EPA proposes that the program would apply to all title V sources (as defined in the approved program) within Idaho, except for any sources within the exterior boundaries of Indian Reservations in Idaho. *See, e.g.*, 59 FR 55813, 55815–18 (Nov. 9, 1994).

5. Proposed Action on Section 112(l) Submittal

Requirements for title V approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to title V sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, if EPA grants interim approval to Idaho's operating permits program, EPA also proposes to grant approval under section 112(l)(5) of the Act and 40 CFR 63.91 of the State of Idaho's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations would apply only to sources covered by Idaho's title V operating permits program.

III. Administrative Requirements

A. Request for Public Comments

EPA is requesting comments on all aspects of this proposed action. Copies of the State's submittal and other information relied upon for the proposed action are contained in a docket maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed action. The principal purposes of the docket are:

(1) To allow interested parties a means to identify and locate documents so that they can effectively participate in the process, and

(2) To serve as the record in case of judicial review.

EPA will consider any comments received by November 27, 1995.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the action proposed today does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: October 17, 1995.

Chuck Clarke,

Regional Administrator.

[FR Doc. 95–26658 Filed 10–26–95; 8:45 am]

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DEPARTMENT OF DEFENSE

48 CFR Part 244 and Appendix C to Chapter 2

Defense Federal Acquisition Regulation Supplement; Contractor Purchasing System Reviews

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comment.

SUMMARY: The Director of Defense Procurement is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide guidance on the need to conduct limited Contractor Purchasing System Reviews (CPSRs) based on risk assessments, and to delete DFARS Appendix C, which contains detailed procedures for the conduct and review of CPSRs.

DATES: Comment Date: Comments on the proposed rule should be submitted in writing to the address below on or before December 26, 1995, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Mr. Rick Layser, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telefax number (703) 602–0350. Please cite DFARS Case 95–D026 in all correspondence related to this issue.